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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 194

LAWRENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, STERLING SUGARS SALES CORP., AND STERLING SUGARS, INC., A DELAWARE CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 18-23) is reported in 48 F. Supp. 647.

JURISDICTION

The judgment of the Court of Claims was entered February 1, 1943 (R. 23). On March 30, 1943, a motion for a new trial was filed which

(1)

was overruled on May 3, 1943 (R. 23). The petition for writ of certiorari was filed July 23, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the proof in the court below was sufficient to establish that the taxpayer bore the burden of the floor stocks taxes involved and has not shifted that burden directly or indirectly within the meaning of Section 902 of the Revenue Act of 1936.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

The special findings of fact of the Court of Claims (R. 9-18) may be summarized as follows:

Petitioner is liquidator of Sterling Sugars, Inc., formerly a Louisiana corporation, which was organized in 1921, and which was actively engaged in business until its dissolution in 1937 (R. 9). This Louisiana corporation was succeeded in 1937 by Sterling Sugars, Inc., a Delaware corporation, which took over all of its assets and assumed all of its liabilities (R. 9-10).

The Louisiana corporation operated plantations for the production of sugarcane in Louisiana and

also owned and operated a sugarcane grinding factory and a sugar refinery in that state. The Sterling Sugars Sales Corporation, which was organized in 1933 by the Louisiana corporation, acted as a sales conduit for the products of the Louisiana corporation, and was not liable for, and did not pay, the floor stocks tax here involved. (R. 10.)

The Louisiana corporation filed returns and paid the floor stocks tax on 147,070 one hundred-pound units of granulated or direct-consumption sugar. A small amount of the tax so paid was refunded, leaving a net amount paid of \$81,783.59. (R. 10.)

On June 29, 1937, a claim for refund was filed by Sterling Sugars, Inc. In connection with correspondence between the Commissioner and representatives of the Sterling Sugars, Inc., in regard to this claim for refund, the following statement appears in a letter dated January 12, 1938, signed by the secretary of Sterling Sugars, Inc. (R. 11-12):

Tax paid on floor stock in June, July, and August 1934, all of which was collected.

This claim for refund was rejected by the Commissioner of Internal Revenue by letter dated August 17, 1940 (R. 13-14).

The floor stocks tax on the cotton content of the bags used as containers for the sugar, imposed August 1, 1933, under the Agricultural Adjustment Act of May 12, 1933, was paid by the

Louisiana corporation on September 14, 1933 (R. 14). The Court of Claims has found that, with respect to the tax paid on the cotton content of bags, in the amount of \$3,101.14, the Louisiana corporation bore the entire burden of this tax (R. 18).

The rate of floor stocks tax on sugar held for sale June 8, 1934, was based on "pounds of raw value" which, reflected in pounds of refined sugar, was 53½ cents per hundred pounds. (R. 14.)

The Louisiana corporation produced the 147,070 one hundred-pound units of granulated or refined sugar on hand June 8, 1934, at varying dates from December 1932 to June 8, 1934. All costs in the manufacture of such refined sugar had been incurred by that date. (R. 14.)

Neither the Sales corporation, nor the Louisiana corporation acting through the Sales corporation, billed the floor stocks tax as a separate item (R. 15). About the middle of September 1933, the price of refined sugar was \$4.70 per unit of one hundred pounds. Due to conditions in the sugar market during the period from that time to December 19, 1933, it declined to \$4.30. On February 11, 1934, the price advanced from \$4.30 to \$4.50 and remained at this level until April 18, 1934. (R. 16-17.) By the first week of June 1934, the price of refined sugar reached a low of \$4.10 per one hundred pounds. On June 8, 1934, the date the tax of 53½ cents became effective, refined sugar prices increased 55 cents per one hundred

pounds, which was an increase due to and to cover the newly imposed tax. (R. 18.)

The Louisiana corporation made no refunds of the tax to its vendees after the tax was invalidated January 6, 1936, or at any other time (R. 18).

Upon the foregoing findings of fact the Court of Claims held that the petitioner was not entitled to recover the floor stocks tax on the sugar, since the tax had been passed on to the vendees. As to the cotton bags, it held that petitioner was entitled to recover the sum of \$3,101.14, and rendered judgment accordingly. (R. 22-23.)

ARGUMENT

On the day the floor stocks tax went into effect on refined sugar, the taxpayer (for convenience the term "taxpayer" is used hereinafter to describe either the Louisiana corporation, the Delaware corporation, or the petitioner as liquidator) advanced the prices of its sugar on account of the tax and to cover it. This fact has been held by a number of the courts to show *prima facie* that the burden of the tax has been passed on to the purchasers. *Honorbilt Products, Inc. v. Commissioner*, 119 F. 2d 797 (C. C. A. 3d); *United States v. H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 992 (C. C. A. 8th), certiorari denied, 317 U. S. 677; *Colonial Milling Co. v. Commissioner*, 132 F. 2d 505 (C. C. A. 6th), certiorari denied, April 5, 1943, No. 782, October Term, 1943.

In addition to this fact the taxpayer here in correspondence with the Commissioner of Internal Revenue referred to the fact that it had "collected" the tax and in its invoices it made a notation that the price included the tax (R. 21). Either the increase in price to cover the tax or the notation to the customers that the price included the tax would be sufficient to establish that the taxpayer had passed the burden of the tax on to its vendees. The two facts taken together are, it would seem, conclusive.

The petition for certiorari is based mainly upon the contention that since the taxpayer did not recover cost plus tax¹ it has established that it bore the burden of the tax. The failure of the court below to make a finding on this does not furnish grounds for certiorari, since in the instant case such a fact is of no significance and would not change the ultimate finding of the court below. In the few cases which have allowed recovery under such circumstances the price increase was not occasioned by the imposition of the tax, but by other factors. In *United States v. Cheek*, 126 F. 2d 1 (C. C. A. 6th), the finding was that the factors and elements affecting the market price were many and varied and impossible to determine. Here it has been found that a price increase was made to cover the newly imposed tax (R. 18).

¹ This was stipulated, but respondent at all times asserted it is irrelevant and immaterial (R. 25).

The fact that in *Insular Sugar Refining Corp. v. United States*, 49 F. Supp. 319 (C. Cls.), pending on petition for certiorari, No. 225, October Term, 1943, and *Colonial Milling Co. v. Commissioner, supra*, the courts stated, as a minimum requirement, that the taxpayer must show that it has not recovered its cost, plus tax, does not carry the connotation, as petitioner assumes, that such a showing will suffice, notwithstanding any other evidence.

Cases of this kind necessarily turn upon the particular facts involved and no basis for certiorari is shown by the circumstances that different results were reached upon different facts. The conclusion of the court below that the taxpayer had not established that it bore the burden of the tax is amply supported by the other undisputed facts already set forth, and it was unnecessary to make the finding requested that the taxpayer had realized a sum less than the cost of production plus the tax.

Should the petition be granted, respondent would support the decision upon an additional ground which the court below rejected. The claim or claims relied upon did not present sufficient data to enable the Commissioner to make any determination as to whether the taxpayer bore the burden of the tax and did not meet the requirements of Article 202 of Treasury Regulations 96 (Appendix, *infra*). Cf. *Lee Wilson &*

Co. v. Commissioner, 111 F. 2d 313 (C. C. A. 8th),
and *Tennessee Consolidated C. Co. v. Commis-*
sioner, 117 F. 2d 452 (C. C. A. 6th).

CONCLUSION

The decision of the court below is clearly correct. No conflict of decisions has been shown and the petition should be denied.

Respectfully submitted.

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AUGUST 1943.

